Petition

Office-Supreme Court, U.S.
FILED
AUG 29 1981
ALEXANDER L. STEVAS,
CLERK

81-398

No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

DONALD W. RIEGLE, Jr., Member,
United States Senate,

Petitioner,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

GRASTY CREWS, II
1511 K Street, N.W.
Washington, D.C. 20005
(202) 638-4500
Attorney for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

THE QUESTION PRESENTED

When a federal court has found that a Member of the Senate has standing to bring an action to redress an injury to his constitutional power of confirmation, and the injury could be prospectively redressed by legislation, does the court have equitable discretion to dismiss the action on the basis of separation-of-powers concerns if, in its view, a hypothetical private plaintiff might acquire standing to bring an action which, although based on a different injury, might result in relief similar to that sought in the action actually brought?

PARTIES

The petitioner here, who was appellant in the Court of Appeals for the District of Columbia Circuit, is the Honorable Donald W. Riegle, Jr., Member, United States Senate.

The respondents here, who were appellees in the Court of Appeals at the time it rendered its decision, were the Federal Open Market Committee, and the following persons in their official capacity as members or alternates on the Federal Open Market Committee: John J. Balles, Robert P. Black, Edward G. Boehne, Robert H. Boykin, E. Gerald Corrigan, William F. Ford, Silas Keehn, Anthony M. Solomon, Thomas M. Timlen, and Willis J. Winn. The discrepancy between certain names in the foregoing list and the defendants named in the complaint, *infra* at 30a, is accounted for by the automatic substitution of parties in accordance with Federal Rule of Civil Procedure 25(d)(1).

TABLE OF CONTENTS

Page

THE QUESTION PRESENTED i

PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 4

REASONS FOR ALLOWING THE WRIT 8

APPENDIX 1a

Opinion of the United States Court of Appeals for the District of Columbia Circuit 1a

Opinion of the United States District Court for the District of Columbia 20a

Order of the United States District Court for the District of Columbia, correcting judgment and denying motion to alter or amend judment 23a

Judgment of United States Court of Appeals for the District of Columbia Circuit 24a

Order of United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing and adding footnote to opinion 26a

Order of United States Court of Appeals for the District of Columbia Circuit denying suggestion for rehearing *en banc* 28a

Complaint 30a

Plaintiff's Motion for Summary Judgment 39a

TABLE OF AUTHORITIES

Cases Page

Federal Open Market Committee of FRS v. Merrill,
443 U.S. 340 (1979) 5

Marbury v. Madison,
5 U.S. 137 (1803) 10

Raichle v. Federal Reserve Bank,
34 F.2d 910 (2d Cir. 1929) 12

Reuss v. Balles,
584 F.2d 461 (D.C. Cir. 1978), *cert. denied*
439 U.S. 997 (1978) 8, 12

Schlesinger v. Reservists' Committee to Stop the War,
418 U.S. 208 (1974) 12

United States Constitution

Article II, § 2 ..... 2, 4

Statutes

Title 5, United States Code, § 702 4

Title 28, United States Code
§ 1254(1) 2
§§ 1331, 1337 4

Federal Reserve Act
§ 4 (12 U.S.C. § 341) 5
§ 10 (12 U.S.C. § 241) 5
§ 12A (12 U.S.C. § 263) 2, 5

Rules of the Supreme Court

Rule 17.1(c) 9

Other

Rules of Organization of the Federal Open Market Committee 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No.

DONALD W. RIEGLE, Jr., Member,
United States Senate,

Petitioner,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINIONS BELOW

The Court of Appeals for the District of Columbia Circuit filed its opinion (*infra,* 1a) in this case on June 24, 1981. In its order (*infra,* 26a) filed July 14, 1981, denying the petition for rehearing, the court, *sua sponte,* added a footnote to its opinion. The opinion of the Court of Appeals is not yet reported.

The District Court for the District of Columbia entered its memorandum order (*infra,* 20a) dismissing the action on October 29, 1980. On November 16, 1980, that court entered an order (*infra,* 23a) correcting judgment and denying the plaintiff's motion to alter or amend judgment.

The opinion of the District Court, as so corrected, is reported at 84 F.R.D. 114.

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was dated and filed June 24, 1981. The order of that court denying the petition for rehearing was dated and filed July 14, 1981, and the order of that court denying appellant's suggestion for rehearing *en banc* was dated and filed July 17, 1981. Jurisdiction is conferred by 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Constitution, Art. II, § 2, Cl. 2:

He [the President] . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

II. Federal Reserve Act § 12A (12 U.S.C. § 263):

SECTION 12A. FEDERAL MARKET COMMITTEE

(a) There is hereby created a Federal Open Market Committee (hereinafter referred to as the "Committee") which shall consist of the members of the Board of Governors of the Federal Reserve System and five representatives of the

Federal Reserve banks to be selected as hereinafter provided. Such representatives shall be presidents or first vice presidents of Federal Reserve banks and, beginning with the election for the term commencing March 1, 1943, shall be elected annually as follows: One by the board of directors of the Federal Reserve Bank of New York, one by the boards of directors of the Federal Reserve Banks of Boston, Philadelphia, and Richmond, one by the boards of directors of the Federal Reserve Banks of Cleveland and Chicago, one by the boards of directors of the Federal Reserve Banks of Atlanta, Dallas, and St. Louis, and one by the boards of directors of the Federal Reserve Banks of Minneapolis, Kansas City, and San Francisco. In such elections each board of directors shall have one vote; and the details of such elections may be governed by regulations prescribed by the committee, which may be amended from time to time. An alternate to serve in the absence of each such representative shall likewise be a president or first vice president of a Federal Reserve bank and shall be elected annually in the same manner. The meetings of said Committee shall be held at Washington, District of Columbia, at least four times each year upon the call of the chairman of the Board of Governors of the Federal Reserve System or at the request of any three members of the Committee.

(b) No Federal Reserve bank shall engage or decline to engage in open-market operations under section 14 of this Act except in accordance with the direction of and regulations adopted by the Committee. The Committee shall consider, adopt, and transmit to the several Federal Reserve banks, regulations relating to the open-market transactions of such banks.

(c) The time, character, and volume of all purchases and sales of paper described in section 14 of this At as

eligible for open-market operations shall be governed with a view to accommodating commerce and business and with regard to their bearing upon the general credit situation of the country.

STATEMENT OF THE CASE

Introduction

This action was brought in the United States District Court for the District of Columbia by a Member of the Senate to enjoin certain individuals from acting as officers of the United States as members of the Federal Open Market Committee, and to enjoin the committee itself from permitting them so to act. The ground asserted by the plaintiff was that nominations of the defendant individuals to be officers of the United States were not submitted to the Senate as required by Art. II, § 2 of the Constitution, and their service as such deprives the plaintiff of his constitutional right to vote in determining the advice and consent of the Senate to their appointment.[1]

Jurisdiction in District Court

As more particularly set forth in ¶¶ 1, 2, and 3 of the complaint (*infra,* 31a), the district court had jurisdiction under §§ 1337 and 1331(a) of title 28, and § 702 of title 5, of the United States Code.

The Federal Open Market Committee

Through its control of open market operations, the Federal Open Market Committee plays the leading role in determining the monetary policy of the United States Government. As this Court recently put it, "Open market operations — the purchase and sale of government

[1]Complaint, *infra,* 30a-38a.

securities in the domestic securities market – are the most important monetary policy instrument of the Federal Reserve System." *Federal Open Market Committee of FRS* v. *Merrill*, 443 U.S. 340 at 343 (1979).

The Committee's twelve members consist of the seven members of the Board of Governors of the Federal Reserve System,[2] and five others who are elected by the boards of directors of the Federal Reserve banks.[3] It is a committee in the etymologically pure sense of a body to which a function has been committed, but it is not a subordinate part of some superior entity which has any power of review or supervision of its action.[4]

The individual defendants were the elective members and alternate members of the FOMC.[5] In order to be eligible for election, an individual must be one of the 24 persons who at any given time are presidents or first vice-president of Federal Reserve banks.[6] While the Board of Governors of the Federal Reserve System has to approve the appointment of any person to the position of Reserve bank president or first vice-president,[7] neither the Board nor any other officers of the United States have any

---

[2]The members of the Board of Governors of the Federal Reserve System are appointed by the President, by and with the advice and consent of the Senate, pursuant to Federal Reserve Act § 10 (12 U.S.C.§ 241).

[3]Federal Reserve Act § 12A(a) (12 U.S.C. § 263(a)).

[4]Federal Reserve Act § 12A (12 U.S.C. § 263).

[5]Complaint, ¶ 11, *infra*, 33a.

[6]*Supra*, note 3.

[7]Federal Reserve Act § 4 (12 U.S.C. § 341).

authority to determine or approve which persons in the eligible class will be elected to the FOMC.[8]

Under the statute,[9] rules,[10] and practice[11] of the FOMC, its elective members exercise the same powers, including the power to vote, as the members appointed by the President with Senate confirmation. The members of the FOMC, when acting as such, are not subject to the direction, supervision, or control of any officers of the United States,[12] and, as already noted, the decisions of the FOMC are not subject to review.

Holdings of the Courts Below

The District Court held that because the plaintiff's grievance could be redressed by legislation, his quarrel lay with his colleagues in Congress,[13] and that for a court to confer standing under these circumstances "would improperly interfere with the legislative process."[14] Accordingly, the District Court dismissed the action.[15]

The Court of Appeals held that the facts pleaded in the complaint sufficiently established, for the purposes of determining the plaintiff's standing to sue, that the elective members of the FOMC are functioning in the capacity of officers of the United States whose nominations are required to be submitted to the Senate, and that Senator

---

[8]Complaint, *infra*, 33a.

[9]*Supra*, note 4.

[10]Rules of Organization of the Federal Open Market Committee.

[11]Complaint, ¶ 26, *infra*, 36a.

[12]Complaint, ¶ 27, *infra*, 37a.

[13]84 F.R.D. at 116, *infra*, 21a.

[14]*Id.*, 116, *infra*, 22a.

[15]*Ibid.*

Riegle's inability to exercise his power under the appointments Clause with respect to them is an injury sufficiently personal to constitute an injury-in-fact.[16] The court held that because the injury is to an interest protected by the Appointments Clause, and would be redressable by a holding that the statute is unconstitutional, Senator Riegle had standing to bring the action.[17]

The Court of Appeals went on to hold, however, that the plaintiff's status as a Member of the Senate requires, or at least permits, the dismissal of his action on the basis of "separation-of-powers concerns" which, the court said, "are best addressed independently of the standing issue."[18] Such concerns arise, the court said, out of the circumstance that Congress could, by legislation, redress the injury of which Senator Riegle complains.[19] From the premises that Congress has such power and that Senator Riegle is a Member of Congress, the court reached the conclusion that to allow Senator Riegle's action to be heard would "permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle."[20]

To avoid such a result, the court said it "should exercise its equitable discretion to dismiss the legislator's action."[21] In developing the basis for what the court called a "prin-

---

[16] *Infra*, 11a-12a.

[17] *Infra*, 12a.

[18] *Infra*, 13a.

[19] *Infra*, 16a-17a.

[20] *Infra*, 18a-19a.

[21] *Infra*, 16a.

cipled exercise of judicial restraint,"[22] the court gave consideration neither to the substance of the claim, nor to the judicial manageability of the relief sought, nor to any equity or want of equity peculiar to this particular plaintiff. The court predicated its dismissal on its assumption that a private plaintiff could acquire standing,[23] but did not address the barriers to private plaintiff standing articulated in *Reuss* v. *Balles*[24] other than to characterize them in a footnote (*infra,* 27a) as *dicta.* The court summarized and concluded its opinion as follows:

> We hold that Senator Riegle has standing to bring this action but exercise our equitable discretion to dismiss the case on the ground that judicial action would improperly interfere with the legislative process.[25]

REASONS FOR ALLOWING THE WRIT

Although it described its decision as an exercise of equitable discretion, it is clear that the Court of Appeals has formulated a new rule of law to govern the justiciability of actions brought by Members of Congress. The opinion cites no case in support of the rule, and the petitioner has found none. Not only does the new rule govern all

---

[22] *Infra,* 19a.

[23] *Infra,* 17a.

[24] In *Reuss,* the same court stated that to satisfy the requirements of redressability, a private plaintiff would have to trace an actual or threatened economic loss to the method of appointment of FOMC members, a burden which the court itself acknowledged to be impossible. 584 F.2d 461 at 469 (D.C. Cir. 1978), *cert. denied,* 439 U.S. 997 (1978). See Wright, C.J., dissenting, 584 F.2d at 471-73.

[25] *Infra,* 19a.

cases falling in the small but sensitive category to which it directly applies, but it also has profoundly disturbing implications for the analytical process involved in judicial review of the constitutionality of any statute, at the behest of any plaintiff. Accordingly, the case falls squarely within the terms of this Court's Rule 17.1(c), in that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

At bottom, the decisions of both the District Court and the Court of Appeals rest upon a contradiction in terms. In our system of jurisprudence, to say that a person has a remedy for a grievance implies the existence of an authority which has the power *and* the duty to perform three essential functions: first, to hear the grievance; second, to apply rational and consistent principles, or a circumscribed and unbiased discretion, in its consideration; and third, to afford some form of relief upon an appropriate showing. Our system of government imposes none of these duties on the Congress; in a democratic order of society it is not the function of a legisture to deal with problems in this way.

The jurisprudential confusion created by the opinions below is epitomized in the phrase, "collegial remedy."[26] If a means of redress is collegial, that is to say legislative, it is both more and less than a remedy: more, because Congress is at liberty to grant a benefit without any showing of injury; less, because Congress is not ordinarily regarded as under a legal duty to grant any redress, no matter how meritorious the claim. If the means of redress is indeed a remedy, it cannot be left with the legislature.

---

[26] *Infra*, 13a.

As for the concern of the courts below about interfering in the legislative process, there is no doubt that cases can be presented that carry the potential for confusion of legislative and judicial roles, but that potential inheres in the nature of the claim sought to be adjudicated or the relief sought to be afforded, and not in the status or office of the plaintiff. Its most familiar context is an adamant refusal of legislative or executive authorities to take an action which both involves an element of discretion and is necessary to avoid depriving the plaintiff of a constitutional right. Compared to the judicial dilemmas posed by that type of case, the case at bar is easy.

An examination of the relief sought by Senator Riegle shows that the has meticulously observed the distinction between legislative and judicial functions. In his motion for summary judgment,[27] he asked the least possible relief necessary to redress his injury, and it is relief which involves not the slightest element of legislative discretion. Specifically, he has asked that the elective members of the FOMC be enjoined from voting, and from serving as chairman or vice-chairman. Such an injunction would be predicated upon a quintessentially judicial determination that the governmental power wielded by voting in the FOMC is such as to require that those who do so be appointed as officers of the United States in accordance with the Constitution.

The same set of facts viewed from a legislative perspective has a much different aspect. If, in the words of *Marbury* v. *Madison,*[28] a federal court were to "declare" that "the law is" that elected representatives of Reserve banks cannot serve as voting members of the FOMC, then the legislative choices could be identified as follows:

---

[27] *Infra,* 39a.

[28] 5 U.S. 137 at 177 (1803).

(1) To do nothing. In that case, the FOMC would continue to operate much as it has, except that voting would be limited to the seven members appointed by the President with Senate confirmation.

(2) To provide for Presidential appointment, subject to Senate confirmation, of Reserve bank presidents, and for their service on the FOMC on a rotating basis like that which the present electoral system produces.

(3) To modify the FOMC in some substantial way, or vest its functions in some other organ of government.

In no way has Senator Riegle ever asked the judiciary to involve itself in any of these legislative choices. He asks no more than any other litigant who has suffered an injury of constitutional dimension. There is nothing in the decisions of this Court to indicate that he is entitled to anything less.

The Court of Appeals recognized that when a litigant has presented a justiciable claim, a court ordinarily has a duty to go forward with the case.[29] It held, however, that where the plaintiff is a Member of Congress and the injury is susceptible of legislative redress, the court can escape that duty by hypothesizing the mere potential existence of a private plaintiff who, though necessarily suffering a different injury, might nevertheless demonstrate standing to bring an action in which the same substantive question would be an issue.[30] Such a rule is deficient on both doctrinal and pragmatic grounds

---

[29] *Infra*, 18a.

[30] *Infra*, 17a.

Philosophically, it is predicated on the same error that was made by the same lower courts in *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208 (1974). If the *primary* task of the federal judiciary is to review the constitutionality of actions taken by other branches of the government, then the likelihood that a better plaintiff will *not* appear is a justification for hearing the Reservists' case, just as the assumed likelihood that a better plaintiff *will* appear is made the justification for turning away Senator Riegle. Such a concept of the role of the federal judiciary is no more acceptable in the latter case than in the former.

Pragmatically, the new rule guarantees that in the class of cases to which it applies, a key issue in the determination of justiciability will not receive an adversarial presentation. It forces the Congressional plaintiff to argue against private plaintiff standing, even though such a position may conflict with other important and legitimate interests of the litigant. The Government is in an even worse position. In order to defend against the Congressional plaintiff, it must supply the battle plan for a successful attack upon itself by private plaintiffs. The Department of Justice has an institutional interest in limiting suits against the Government in general, and the particular agency involved has an even more direct interest in protecting its own programs and personnel. Realizing this, as the Court of Appeals apparently did in the case at bar when it formulated the rule and applied it without any briefing or argument at all, a court may inadvertently base its decision on an assumption which is at odds with history[31] and doctrine[32] alike.

---

[31] In the 67 years since Federal Reserve banks commenced operations, no plaintiff answering the description of which the Court of Appeals said "one can easily conceive" (*infra*, 17a) has ever appeared.

[32] *Reuss* v. *Balles*, *supra*, note 24; *Raichle* v. *Federal Reserve Bank*, 34 F.2d 910 at 915 (2d Cir. 1929).

If there is to be a restriction upon the justiciability of actions brought by Members of Congress, that restriction ought not to turn on an issue whose presentation will involve one or both parties in a conflict of interest. This consideration reinforces the conclusion that the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

Respectfully submitted,

GRASTY CREWS, II
1511 K Street N.W.
Washington, D.C. 20005
(202) 638-4500

Attorney for the Petitioner

APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 80-1061

DONALD W. RIEGLE, JR., MEMBER,
U.S. SENATE, APPELLANT

v.

FEDERAL OPEN MARKET COMMITTEE, ET AL.
APPELLEES

Appeal from the United States District Court
for the District of Columbia

(D.C. Civil Action No. 79-1703)

Argued January 15, 1981

Decided June 24, 1981

Grasty Crews, III, for appellant.

Lewis K. Wise, Attorney, Department of Justice with whom *Alice Daniel*, Assistant Attorney General, *Charles F. C. Ruff*, United States Attorney and *Anthony Stein-*

meyer, Attorney, Department of Justice were on the brief for appellees.

Before: ROBB and EDWARDS, *Circuit Judges* and PENN*, *United States District Judge* for the District of Columbia

Opinion for the Court filed by *Circuit Judge* ROBB.

ROBB, *Circuit Judge*: This case presents the question whether a United States Senator has standing to challenge the constitutionality of the procedures established by the Federal Reserve Act, 12 U.S.C. § 221 *et seq.* (1976) for the appointment of the five Reserve Bank members of the Federal Open Market Committee. A corollary question is whether, assuming the Senator has standing, this court should afford him relief. The complaint of the appellant, Senator Donald W. Riegle, Jr., of Michigan, was dismissed by the United States District Court for the District of Columbia on the ground that the Senator lacked standing to seek injunctive relief from the allegedly unconstitutional procedures authorized by the Act. *Riegle v. Federal Open Market Committee, et al.*, 84 F.R.D. 114, 116 (D.D.C. 1979) (Gesell, J.). We affirm on a ground different from that relied upon below.

I.

The Federal Reserve System, which was created by Congress in 1913 as this nation's central bank, is comprised of public and private entities organized on a regional basis with federal supervisory authority.[1] The

* Sitting by designation pursuant to 28 U.S.C. § 292(a).

[1] *See* Reuss v. Balles, 189 U.S.App.D.C. 303, 584 F.2d 461, 462-65, *cert. denied*, 439 U.S. 997 (1978) for a description of the Federal Reserve System, open market operations, and the evolution and functions of the FOMC. *See also* T. MAYER, J. DUESENBERRY, & R. ALIBER, MONEY, BANKING, AND THE ECONOMY (1981); "A Look Inside Paul Volcker's Fed," *N.Y. Times* (May 3, 1981), sec. 3, at 1, 8-9.

System includes a seven-member Board of Governors, the twelve regional Federal Reserve Banks, the FOMC, the Federal Advisory Council, and approximately 5,500 privately-owned member commercial banks. (Br. of FOMC at 4) The primary role of the System in the conduct of monetary policy is to facilitate the achievement of national economic goals through influence on the availability and cost of bank reserves, bank credit, and money. Three basic mechanisms employed by the System to implement monetary policy are open market operations, regulation of member bank borrowing from the Federal Reserve Banks, and establishment of member bank reserve requirements. The most flexible and potentially significant of these tools is open market transactions. (Br. of FOMC at 6)

Open market trading, which consists of the purchase and sale of government and other securities in the financial markets by the Reserve Banks, is exclusively directed and regulated by the FOMC. 12 U.S.C. § 263 (b) (1976). The FOMC, like the System as a whole, is constituted to reflect both public and private interests. Since 1935 the FOMC has been composed of the seven members of the Board of Governors of the Federal Reserve System, 12 U.S.C. § 241 (1976), who are appointed by the President with the advice and consent of the Senate, and five representatives of the Federal Reserve Banks, who are elected annually by the boards of directors of the Banks. 12 U.S.C. § 263(a) (1976). Since 1942 Congress has required that the five Reserve Bank members of the FOMC be either presidents or first vice presidents of the Reserve Banks. 12 U.S.C. § 263(a). The Reserve Banks are private corporations whose stock is owned by the member commercial banks within their districts. 12 U.S.C. § 321 (1976). These member commercial banks elect six of the nine members of the board of directors of each Reserve Bank, and the Board of Governors of the Federal Reserve System selects the re-

maining three. 12 U.S.C. §§ 302, 304 (1976). The presidents and first vice presidents of the Reserve Banks, although selected by the respective boards of directors, are subject to the approval, suspension, and removal authority of the Board of Governors. 12 U.S.C. §§ 341, 248 (1976). In short, the FOMC consists of seven members who hold their offices by virtue of presidential appointments confirmed by the Senate, and five members who are elected by the boards of directors of the Banks and who hold their offices subject to the approval of the Board of Governors. 12 U.S.C. § 263(a).

The securities transactions directed by the FOMC have a significant effect on the financial markets. In 1974, for example, the FOMC alone was responsible for approximately $19.4 billion in outright transactions in U.S. Government Securities. (Br. of Riegle at 5) These transactions potentially affect the value of the dollar, foreign exchange rates, interest rates, investment, and employment. *Id.* Approximately every 45 days, the FOMC formulates its monetary policy objectives for the immediate future by setting targets for growth rates in the money supply and the range of variance in the Federal Funds rate (the member banks' rate for overnight loans of excess reserves to other banks). The FOMC then issues a domestic policy directive to the Federal Reserve Bank of New York for the management of the System Open Market Account, which is a central entity representing the open market transaction interests of the twelve Reserve Banks. The manager of the Account, who maintains daily contact with Federal Reserve staff members in Washington, engages in financial transactions designed to achieve the monetary conditions sought by the FOMC. Reserve Banks are prohibited under the Act from engaging in any open market transactions except those directed by the FOMC through the Account. 12 U.S.C. § 263(b).

Considering the substantial economic power wielded by the FOMC, it is not surprising that controversy over the balance between public and private control of the Committee has existed since its creation. As originally constituted, the FOMC was privately dominated, consisting solely of representatives of the twelve Reserve Banks. Banking Act of 1933, 48 Stat. 162. This arrangement was unsatisfactory to those who favored greater governmental control over disposition of Reserve Bank funds. During debates on the Senate floor preceding passage of the Banking Act of 1935, 49 Stat. 704, Chairman Carter Glass of the Senate Banking Committee (a supporter of Reserve Bank control of the FOMC) explained the legislative compromise between public (Board of Governors) and private (Reserve Bank) interests which produced the present procedure for constituting the FOMC:

> [We are] amazed to have it proposed that the Federal Reserve Board alone should constitute the open-market committee of the system. . . . The Government of the United States has never contributed a dollar to one of the Reserve Banks; yet it is proposed to have the Federal Reserve Board, having not a dollar of pecuniary interest in the Reserve funds or the deposits of the Federal Reserve banks or of the member banks . . . to make such disposition of the reserve funds of the country, and in large measure the deposits of the member banks of the country, as they may please . . . . [I]n order to reconcile bitter differences there was yielding, and we have now proposed an open-market committee composed of all 7 members of the Federal Reserve Board and 5 representatives of the regional reserve banks.

79 Cong. Rec. 11778 (1935).

Despite the passage of the compromise represented by the Banking Act of 1935, the debate over public and private control of the FOMC has continued during the past 48 years. The late Congressman Wright Patman,

Chairman of the House Banking Committee, asserted in 1938 that the Reserve Bank members of the FOMC did not represent the "people's interest."[2] Mr. Patman's successor, Congressman Henry S. Reuss, has made several unsuccessful attempts, both in Congress by amendment of 12 U.S.C. § 263(a) and in the federal courts, to require that the five Reserve Bank members of the FOMC be appointed with the advice and consent of the Senate pursuant to the Appointments Clause. United States Constitution, Art. II, sec. 2, cl. 2. Based on his belief that the work of the FOMC "is essentially a governmental function, and should not be exercised by private people,"[3] Mr. Reuss in 1976 introduced the "Federal Reserve Reform Act," H.R. 12934, 94th Cong., 2d Sess. (1976), which in part would have required that the five Reserve Bank seats on the FOMC be limited to Bank presidents appointed by the President with the advice and consent of the Senate. The House Banking Committee defeated this provision on April 30, 1976. (Br. of FOMC at 21) Mr. Reuss then brought an action in federal court seeking, in part, to have 12 U.S.C. § 263 (a) declared unconstitutional. The District Court dismissed the action on the ground that the Congressman lacked standing to sue either in his capacity as a congressman or as a private bondholder. *Reuss v. Balles*, 73 F.R.D. 90 (D.D.C. 1976) (Parker, J.), *aff'd*, 189 U.S. App. D.C. 303, 584 F.2d 461, *cert. denied*, 439 U.S. 997 (1978). On April 1, 1980 Congressman Reuss introduced another bill, H.R. 7001, which would amend 12 U.S.C. § 263(a) in the manner sought by Senator Riegle in this case: a prohibition on voting by the five Reserve

---

[2] Hearings before the House Banking and Currency Committee on H.R. 7230, 75th Cong., 3d Sess. 56 (1938).

[3] Hearings before the Subcommittee on Domestic Finance of the House Committee on Banking and Currency "The Federal Reserve System After Fifty Years," 88th Cong., 2d Sess. 37 (1964).

Bank members of the FOMC. This legislation was not enacted.[4] (Br. of FOMC at 21-22)

Senator Riegle instituted the present suit on July 2, 1979 (prior to the introduction of H.R. 7001 by Congressman Reuss) in the United States District Court for the District of Columbia, seeking injunctive relief in the form of an absolute prohibition on voting by the Reserve Bank members of the FOMC. (J.A. at 8) In an opinion by District Judge Gesell, the court dismissed the action for lack of standing. *Riegle v. Federal Open Market Committee, supra*, at 116. The court reasoned that

> Senator Riegle's injury is of a political nature, deriving solely from the acts or omissions of his colleagues and not in any way from the actions of the named defendants. *Reuss v. Balles, supra* 584 F.2d at 468. . . . What the Court must decide is whether or not a Congressman from either chamber has standing to challenge the constitutionality of a statutory provision on which he has failed to persuade his colleagues in the past and remains free to attempt persuasion in the future. The Court concludes that to confer standing upon such a Congressman without more would improperly interfere with the legislative process.

84 F.R.D. at 116 (citations omitted). The decision of the District Court is now before us on appeal.

II.

Senator Riegle alleges that both the defendant individuals, "[b]y acting as officers of the United States when their nominations have never been submitted to the Senate," and the defendant executive agency, "[b]y per-

---

[4] H.R. 7001, after consideration by the Subcommittee on Domestic Monetary Policy, was forwarded as a clean bill, H.R. 8223, to the Committee on Banking on October 1, 1980. The bill died within this Committee.

mitting the defendant individuals to act as officers of the United States when their nominations have never been submitted to the Senate," deprive him of his constitutional right to vote in determining the advice and consent of the Senate to the appointment of the five Reserve Bank members of the FOMC. (Complaint, J.A. at 11) When ruling on a motion to dismiss for want of standing, "both the trial and reviewing courts must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. 490, 501 (1975). We assume, therefore, that the procedure for constituting the FOMC contained in 12 U.S.C. § 263(a) of the Act results in a deprivation of Senator Riegle's constitutional right to advise and consent regarding the appointment of the defendant officers of the executive branch. Senator Riegle seeks not declaratory relief but rather "an injunction against their [five Reserve Bank members] *voting* as members of the FOMC, conduct which deprives him of *his* right to vote in determining the advice and consent of the Senate to the appointment of officers at the highest level of government." (Br. of Riegle at 43) (Emphasis in original)

Two contradictory principles pervade the opinions of this court concerning the standing of congressional plaintiffs. First, no distinctions are to be made between congressional and private plaintiffs in the standing analysis. As we stated in *Harrington v. Bush*, 180 U.S. App. D.C. 45, 553 F.2d 190, 204 (1977) (emphasis omitted), "there are no special standards for determining Congressional standing questions." Second, this court will not confer standing on a congressional plaintiff unless he is suffering an injury that his colleagues cannot redress. When congressional plaintiffs have sought to accomplish in this court what they were unable to persuade their colleagues to do, we have usually refused to confer standing because of our concern for non-interference in the

legislative process. *See, e.g., Reuss v. Balles, supra; Harrington v. Bush, supra. Cf. Kennedy v. Sampson*, 167 U.S. App. D.C. 192, 511 F.2d 430 (1974), holding that nullification of a senator's vote due to pocket veto of bill by the President constitutes sufficient injury to confer standing; *Goldwater v. Carter*, 199 U.S. App. D.C. 115, 617 F.2d 430 (*en banc*), holding that disenfranchisement of a senator because of the attempt by the President to terminate the Taiwan Treaty without the advice and consent of the Senate is injury sufficient to confer standing, *judgment vacated*, 444 U.S. 996 (1979) (*mem.*). We believe that these two contradictory principles create unnecessary confusion when applied to suits brought by congressional plaintiffs. As the former Chief Judge of this court recently observed,

> There can be no peaceful coexistence between, on the one hand, the notion that legislators are treated like any other plaintiff for standing purposes, and, on the other, the idea that courts should rigorously scrutinize whether the congressional plaintiff's true quarrel is with his colleagues, rather than the executive. There is no general requirement that a private litigant employ self-help before seeking judicial relief. Nor should there be, because an ordinary plaintiff, having suffered injury in fact within the contemplation of the law he invokes, is entitled to his day in court. If the plaintiff passes the standing test and presents a justiciable dispute, it is assumed that the political branches have decided to commit such disputes to the judiciary and, barring extraordinary circumstances, that is a judgment which courts are bound to respect.

Hon. Carl McGowan, "Congressmen in Court: The New Plaintiffs," 15 GA. L. REV. 241, 254-255 (1981) (McGowan) (citations omitted). Accordingly we shall proceed by applying to this case the traditional standing tests for non-congressional plaintiffs gleaned from opinions of the Supreme Court. Thereafter, we shall exam-

ine what additional considerations, if any, must enter our analysis by virtue of the plaintiff's status as a Member of the United States Senate.[5]

The Supreme Court in *Ass'n of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970), established a two-part test for standing: injury (i) in fact and (ii) to an interest "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 152-53. A causation requirement was added in *Warth v. Seldin*, *supra* at 505: the plaintiff must prove that "the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm." This causation requirement was elaborated upon in *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42, 45 (1976), where the Court observed that "the 'case or controversy' limitation of Art. III still requires that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." Again, however, the Court stated the causation requirement in the alternative, quoting *Warth v. Seldin, supra*: the causation requirement is satisfied if the plaintiff establishes that the injury was "the consequence of the defendants' actions" *or* that exercise of the court's remedial powers would redress the injury. 426 U.S. at 45. *See also Duke Power Co. v. North Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 74 (1978). Although recent cases have suggested a slight relaxation of

---

[5] By postponing consideration of this court's congressional standing opinions until the latter part of the discussion, we seek to illustrate the conceptual imprecision which results from attempts to achieve through standing analysis the resolution of those separation-of-powers problems peculiar to congressional plaintiff cases. *See generally*, McGowan, *supra*; Note, "Congressional Access to the Federal Courts," 90 HARV. L. REV. 1632 (1977).

the above tests, *see, e.g., Duke Power, supra* at 80-81, the three requirements stated above represent the maximum burden which a plaintiff must bear to attain standing: establishment of (i) injury-in-fact (ii) to an interest protected by the relevant law (iii) where the injury is caused by defendants' actions or capable of judicial redress.

We think it may be argued plausibly that Senator Riegle has met the above burden. First, assuming that the five Reserve Bank members of the FOMC are officers who must be appointed with the advice and consent of the Senate,. Riegle's inability to exercise his right under the Appointments Clause of the Constitution is an injury sufficiently personal to constitute an injury-in-fact. As the Court observed in *Warth v. Seldin, supra at* 498-99, the plaintiff must allege " 'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." Second, with regard to the causation requirement, we note that the named defendants in this action (the five Reserve Bank members of the FOMC) are not the causes of the injury to Senator Riegle. The five Reserve Bank members were elected by the directors of the Federal Reserve Banks. It is these directors, rather than the five FOMC members in question, who are exercising an appointment power which deprives Senator Riegle of his right to vote on determining the advice and consent of the Senate to the appointments of officers. Thus, the requirement that "the asserted injury was the consequence of the defendants' actions," *Warth v. Seldin, supra,* has not been met. However, as noted above at page 10, the causation requirement can also be met by showing that "prospective [judicial] relief will remove the harm." *Warth v. Seldin, supra.* Because it is within the power of this court to redress the alleged injury by holding that 12 U.S.C. § 263(a) is unconstitutional, the causation requirement

has been satisfied despite the naming of inappropriate defendants.[6] Third, the interest which Riegle claims was injured by defendants' action (his right to advise and consent to the appointment of officers of the executive branch) is within the zone of interests protected by the Appointments Clause of the Constitution, *supra*. In short, although there is room for argument as to whether Senator Riegle clearly satisfies all requirements of the most stringent version of the Supreme Court's standing test, we think it reasonable to hold that he has standing.[7]

---

[6] Although it can be argued that the Senate rather than the directors of the Federal Reserve Banks has, through the passage of 12 U.S.C. § 263(a) of the Act, caused Riegle's injury, to conclude therefrom that the Senator would not satisfy the first formulation of the causation test even had he named the Bank directors as defendants would violate the principle of equality between private and congressional plaintiffs in the standing inquiry. When a plaintiff alleges injury by unconstitutional action taken pursuant to a statute, his proper defendants are those acting unconstitutionally under the law (i.e., the Bank directors), and not the legislature which enacted the statute. *See generally, Marbury v. Madison*, 5 U.S. 137, 175-80 (1803).

[7] This case differs from Reuss v. Balles, *supra* at note 1, where standing was denied to a congressman who claimed, in part, that improper delegation of responsibilities to the FOMC resulted in usurpation of his powers under Article I, sec. 8 of the Constitution to coin and regulate the value of money, to regulate commerce, and to borrow money on the credit of the United States. *Id.* at 467. The court noted in the *Reuss* case that judicial relief could not possibly cure the alleged injury, for even were the court to require that all FOMC members be presidential appointees, the Committee would retain delegated powers and the congressman's role in setting monetary policy would not be enhanced by the judicial relief he sought. In this case, on the other hand, judicial relief in the form of invalidation of 12 U.S.C. § 263(a) would prevent the directors of the Banks from exercising their allegedly unconstitutional appointment power as well as render invalid the appointments of the five Reserve Bank members of the FOMC.

III.

Appellant's status as a Member of the United States Senate, however, raises separation-of-powers concerns which are best addressed independently of the standing issue. As we observed *supra* at pages 8-9, the principle that a legislator must lack collegial or "in-house" remedies before this court will confer standing has been a theme of our congressional plaintiff opinions. This principle is a departure from traditional standing analysis because it violates the principle of equality between legislator and private plaintiffs; non-legislator plaintiffs are not routinely denied standing because of the presence of an alternative remedy. Moreover, the inappropriateness of the collegial remedy principle as an aspect of congressional standing analysis has resulted in its inconsistent application in the case law of this court. For example, in *Public Citizen v. Sampson*, 379 F. Supp. 662 (D.D.C. 1974), *aff'd mem.*, 169 U.S. App. D.C. 301, 515 F.2d 1018 (1975), *Harrington v. Bush*, *supra* at 212-214, and *Reuss v. Balles*, *supra* at 468, standing was withheld from congressional plaintiffs in part because their power to vote, i.e., to enact legislation to cure the alleged injury, remained unimpaired. Yet in *Kennedy v. Sampson*, *supra*, the court conferred standing on Senator Kennedy to challenge the legality of an attempted pocket veto of a bill for which he had voted. We reasoned that executive impairment of the Senator's past vote had nullified Kennedy's legislative power. *Id.* at 436. The Senator had, however, collegial remedies comparable to those which negated standing in the *Public Citizen*, *Harrington*, and *Reuss* cases; Senator Kennedy's power to reintroduce the relevant legislation in the next session of Congress and to vote thereon remained unimpaired. In *Goldwater v. Carter*, *supra*, this court's most recent opinion regarding congressional standing, legislator plaintiffs were again granted standing despite the presence of adequate collegial remedies. The plaintiffs in the *Goldwater*

case were a small group of senators and representatives who asserted that President Carter could not terminate the Mutual Defense Treaty with Taiwan without either a two-thirds vote of the Senate or a majority of both houses of Congress. A majority of this court reasoned that the plaintiffs had been "disenfranchised" by the President's action because a requisite number of senators could never force an unwilling Senate to vote on a declaration of their right to block rescission of the Taiwan Treaty, nor was there any assurance that the President would heed any Senate action. 617 F.2d at 702-703. Yet collegial remedies existed because Senate resolutions regarding the Treaty were pending at the time. McGowan, at 247-48. On appeal the Supreme Court vacated our judgment on the grounds that the plaintiffs did not pose a justiciable question. 444 U.S. 996 (1979) (*mem.*) The Court ignored the standing concept altogether and, in separate opinions by Justices Powell and Rehnquist, neither of which gained a majority of the Court, relied upon the doctrines of ripeness and political question, respectively. *Id.* at 997, 1002.

If, as the ultimate disposition of *Goldwater v. Carter* suggests, the Supreme Court does not believe that the standing doctrine is capable of reflecting the prudential concerns raised by congressional plaintiff suits, this court ought not persist in the attempt to make it do so. The doctrinal difficulties presented by an attempt to reconcile our denial of congressional standing in the *Public Citizen*, *Harrington*, and *Reuss* cases, on the one hand, with our conferral of legislator standing in the *Kennedy* and *Goldwater* cases, on the other, suggest that

> [t]he use of the standing doctrine to address the separation-of-powers concerns arising when federal legislators sue the executive branch in federal court is fraught with difficulties both in theory and in application. Although it has been the most popular method of judicial self-restraint in these cases, the recent Supreme Court decision in *Goldwater*, which

> made no use of the term, suggests that its day may have passed insofar as these lawsuits are concerned.

McGowan, at 256. Moreover, we are convinced that the doctrines of ripeness and political question are no "more elegant in their conception [n]or more satisfying in their execution" than the standing concept as a means of articulating our prudential concerns in congressional plaintiff cases. McGowan, at 256-261. The political question doctrine justifies a finding of nonjusticiability primarily when there is an explicit textual commitment of the controversy to a non-judicial branch of government for resolution. *Id.* at 258. In the case under review, the Appointments Clause of the Constitution has no such textual commitment of the advice and consent issue exclusively to the legislature.[8] On the contrary, "[n]othing in articles II or III [of the Constitution] suggests that, assuming the court has jurisdiction, anyone but the judicial branch should decide this question." McGowan, at 258. In short, a clear constitutional or statutory prohibition of judicial review will surely not be present in many cases where prudential concerns nevertheless warrant a court in finding it improper for a congressional plaintiff to invoke the judicial power. As to ripeness, one can conceive of instances when executive action has been

---

[8] The Appointments Clause of the Constitution, Art. II, sec. 2, cl. 2, reads as follows:

> [The President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur; and he shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

taken which may create a situation ripe for judicial review (this case, for example), but separation-of-powers concerns justify judicial restraint. Neither the ripeness nor political question doctrine, in summary, is sufficiently catholic in formulation or flexible in application to resolve the prudential issues arising in congressional plaintiff cases.

The most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion. Where a congressional plaintiff could obtain substantial relief from his fellow legislators through the enactment, repeal, or amendment of a statute, this court should exercise its equitable discretion to dismiss the legislator's action. For the reasons set forth below, this test avoids the problems engendered by the doctrines of standing, political question, and ripeness. The standard would counsel the courts to refrain from hearing cases which represent the most obvious intrusion by the judiciary into the legislative arena: challenges concerning congressional action or inaction regarding legislation. Yet this standard would assure that non-frivolous claims of unconstitutional action which could only be brought by members of Congress will be reviewed on the merits.

The above standard would counsel dismissal of a congressional plaintiff's claim in cases concerning legislative action or inaction because it is in these cases that the plaintiff's dispute appears to be primarily with his fellow legislators. In these circumstances, separation-of-powers concerns are most acute. Judges are presented not with a chance to mediate between two political branches but rather with the possibility of thwarting Congress's will by allowing a plaintiff to circumvent the processes of democratic decisionmaking. "This meddling with the internal decisionmaking processes of one of the political branches extends judicial power beyond the limits inher-

ent in the constitutional scheme for dividing federal power." McGowan, at 251. *See, e.g., Harrington v. Bush, supra* at 214; *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1973). Thus, where a congressional plaintiff has standing to challenge the actions of those acting pursuant to a statute which could be repealed or amended by his colleagues, or where he alleges an injury which could be substantially cured by legislative action, our standard would counsel judicial restraint. In all such cases, it is unlikely that an unconstitutional action or statute would go unreviewed. While we discourage congressional plaintiffs in such circumstances, it is probable that a private plaintiff could acquire standing to raise the issue of unconstitutionality before a court. Because such a private plaintiff's suit would not raise separation-of-powers concerns, the court would be obliged to reach the merits of the claim. In this case, for example, although prudential considerations warrant the dismisal of Senator Riegle's claim, one can easily conceive of a private plaintiff who could acquire standing to bring a similar claim. A person with significant economic interests in the open securities markets and prime lending rates, *e.g.*, a major corporation, pension fund, or other major investor, might qualify for standing to challenge the constitutionality of a procedure which allegedly permits improperly appointed officials to so substantially influence the monetary policy of the United States, open market trading, and prime rates.

When a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would likely not qualify for standing, the court would be counseled under our standard to hear the case. Thus, such actions as impeachment, expulsion proceedings, impoundment, and certain acts of the executive not subject to direct legislative redress or private party challenge (*e.g.*, the pocket veto in *Kennedy v. Sampson, supra*) would be subject to judicial review in

a congressional plaintiff case. These circumstances (which are not intended to exhaust the possibilities) represent situations where absent congressional plaintiff actions, it is possible that non-frivolous claims of unconstitutional action would go unreviewed by a court.

In short, our standard would counsel dismissal of congressional plaintiff actions only in cases in which (i) the plaintiff lacks standing under the traditional tests, or (ii) the plaintiff has standing but could get legislative redress and a similar action could be brought by a private plaintiff. Nondiscriminatory application of standing principles warrants dismissal of the action in the former circumstance; non-interference in the legislative process counsels dismissal in the latter situation. We would welcome congressional plaintiff actions involving non-frivolous claims of unconstitutional action which, because they could not be brought by a private plaintiff and are not subject to legislative redress, would go unreviewed unless brought by a legislative plaintiff. In this last situation, there are no prudential considerations or separation-of-powers concerns which would outweigh the mandate of the federal courts to "say what the law is". *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

In this case there can be no doubt that Senator Riegle's congressional colleagues are capable of affording him substantial relief. Indeed, a bill which would accomplish Senator Riegle's objective was introduced in Congress as recently as 1980. *See* note 4 *supra*. The Senator remains free to attempt to persuade his fellow legislators of the wisdom of his views. His colleagues, if so persuaded, are empowered to redress the alleged inadequacies of 12 U.S.C. § 263(a) of the Act through amending legislation. Senator Riegle's attempt to prohibit voting by the five Reserve Bank members of the FOMC is yet another skirmish in the war over public versus private control of the Committee which has been waged in the legislative arena since 1933. It would be unwise to permit the fed-

eral courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle.

Assuming that the current procedure for constituting the FOMC may be unconstitutional, we must nevertheless weigh the danger of permitting such a statute to stand against two countervailing concerns: (1) the potential for misuse of the judicial system inherent in hearing a case brought by this particular plaintiff, who, because of his congressional status, has adequate collegial remedies; and (2) the unwarranted interference in the legislative process which judicial action would represent at this time. We conclude that rendering a decision on the merits in this case would pose a greater threat to the constitutional system than would the principled exercise of judicial restraint. As Judge Gesell perceptively recognized, we should not "improperly interfere with the legislative process." 84 F.R.D., *supra* at 116.

We hold that Senator Riegle has standing to bring this action but exercise our equitable discretion to dismiss the case on the ground that judicial action would improperly interfere with the legislative process.

The judgment dismissing the complaint is

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD W. RIEGLE, JR., *Plaintiff,*	)	
v.	)	Civil Action No. 79-1703
FEDERAL OPEN MARKET COMMITTEE, ET AL., *Defendants.*	)	

ORDER

Plaintiff, a United States Senator from Michigan, seeks declaratory and injunctive relief from a statute authorizing allegedly unconstitutional appointments to the Federal Open Market Committee ("FOMC"), a component of the Federal Reserve System. The matter is before the Court on plaintiff's motion for summary judgment and defendants' motion to dismiss. The Court, having considered the supporting documentation and oral arguments presented by the parties, concludes that plaintiff lacks standing to maintain this action and the action therefore must be dismissed.

It is claimed that the five voting members of the FOMC serving pursuant to authority of 12 U.S.C. § 263(a), but without the advice and consent of the Senate, are acting unconstitutionally because they have not qualified in accordance with the requirements of the Appointments Clause, Article II, Section 2, of the Constitution of the United States. Plaintiff recognizes that he cannot establish his standing to sue as a citizen by asserting a generalized abstract injury of constitutional dimension. *Schlesinger* v. *Reservists Comm. to Stop the War,* 418 U.S. 208

(1974). Nor does the Senator allege that he has suffered a personalized injury as an individual legislator, unaccompanied by harm to the institution of the Senate. *See Powell* v. *McCormack,* 395 U.S. 486 (1969). Rather, he claims that the Senate by its approval of 12 U.S.C. § 263(a) has imposed an injury on its members, particularly plaintiff, whose committee assignments involve him directly in matters which concern the operation of the Federal Reserve System. Plaintiff's status as a litigant in this action rests, therefore, on his ability to establish his standing as a Congressman who has suffered an individual injury derivative of an injury to the interest of the Senate as a whole. *See Harrington* v. *Bush,* 553 F.2d 190 (D.C. Cir. 1977); *Kennedy* v. *Sampson,* 511 F.2d 430 (D.C. Cir. 1974).

Plaintiff has failed to satisfy this standard. Unlike the injured party in *Kennedy* v. *Sampson,* Senator Riegle's alleged injury does not stem from Executive action that frustrates an otherwise effective congressional enactment, nor does it impair his powers as a legislator in any manner that is not redressable by Congress. The legislative process continues to operate in unimpeded fashion; Congress' power to require additional FOMC membership criteria remains clearly undiminished. *See Reuss* v. *Balles,* 584 F.2d 461, 467-68 (D.C. Cir.), *cert. denied,* 439 U.S. 997 (1978); *Harrington* v. *Bush, supra,* 553 F.2d at 199-200 n. 41. Congress enacted the relevant statutory provision over 40 years ago, it has had numerous opportunities to amend the statute since that time, and it retains the option to modify the statute today. Under these circumstances, it appears that Senator Riegle's injury is of a political nature, deriving solely from the acts or omissions of his colleagues and not in any way from the actions of the named defendants. *Reuss* v. *Balles, supra* 584 F.2d at 468. *See Simon* v. *Eastern Ky. Welfare Rights Org.,* 426 U.S. 26, 41-42 (1976).

Plaintiff's attempt to distinguish *Reuss* v. *Balles* by relying on the Senate's powers under the Appointments Clause is unavailing. The distinction plaintiff would have this Court draw wrongly focuses attention on the question of which chamber is the possessor of a given constitutional authority. What the Court must decide is whether or not a Congressman from either chamber has standing to challenge the constitutionality of a statutory provision on which he has failed to persuade his colleagues in the past and remains free to attempt persuasion in the future. The Court concludes that to confer standing upon such a Congressman without more would improperly interfere with the legislative process.

Accordingly, plaintiff's motion for summary judgment is denied; defendants' motion to dismiss is granted, and the action is hereby dismissed.

SO ORDERED.

/s/ Gerhard A. Gesell
UNITED STATES DISTRICT JUDGE

October 26, 1979.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD W. RIEGLE, JR., *Plaintiff,*	)	
v.	)	Civil Action No. 79-1703
FEDERAL OPEN MARKET COMMITTEE, ET AL., *Defendants.*	)	

ORDER

Upon consideration of plaintiff's motion to correct judgment, it is hereby

ORDERED that the Order of this Court entered on October 26, 1979, in the above-captioned case is hereby corrected by striking the words "declaratory and" from the first sentence thereof.

Upon consideration of plaintiff's motion to alter or amend judgment and the entire record herein, it is hereby

ORDERED that the motion to alter or amend is denied.

/s/ Gerhard A. Gessell
UNITED STATES DISTRICT JUDGE

November 9, 1979.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

No. 80-1061

Donald W. Riegle, Jr., Member,
U.S. Senate

Appellant,

v.

Federal Open Market Committee, et al.

Appellees.

Appeal from the United States District Court for the District of Columbia

Before: ROBB and EDWARDS, Circuit Judges and PENN*, United States District Judge for the District of Columbia

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia, and was argued by counsel.

On consideration thereof It is ordered and adjudged by this Court that the judgment _____ of the District Court appealed from in this cause is hereby affirmed, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/George A. Fisher
Clerk

Date: June 24, 1981
Opinion for the Court filed by Circuit Judge Robb
*Sitting by designation pursuant to 28 U.S.C. § 292(a).

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
September Term, 1980

No. 80-1061

Donald W. Riegle, Jr., Member,
U.S. Senate,

Appellant

v.

Federal Open Market Committee, et al.

BEFORE: Robb and Edwards, Circuit Judges; Penn*,
Judge, United States District Court for
the District of Columbia
(Civil Action No. 79-1703) –
George A. Fisher, Clerk
Filed July 14 1981

ORDER

The petition for rehearing is denied. The court *sua sponte* adds the following n.9 at the conclusion of the paragraph ending at the bottom of page 17 of the court's slip opinion:

*Sitting by designation pursuant to Title 28 U.S.C. § 292 (a).

[9]Our suggestion that a private plaintiff might acquire standing to challenge the FOMC appointment procedure on the basis of investment holdings is not inconsistent with the holding in *Reuss* v. *Balles, supra* at 469, that Congressman Reuss lacked standing to sue in his capacity as a private bondholder. The court in the *Reuss* case dismissed the private party claim on the ground that *no concrete injury* had ever been alleged; Reuss's allegation was simply that FOMC actions "*may* cause injury to some property interest of which the plaintiff is possessed as a bondholder." *Id.* [Emphasis in original] The court clearly held that "it is beyond our power to address injuries that are merely conjectural," *ibid.* The court did *not* hold that under no circumstances could private bondholders acquire standing. The court conjectured that a private bondholder alleging concrete injury might nevertheless not qualify for standing. These comments were not necessary to the holding and we do not think they establish that a private bondholder may never qualify for standing even if he alleges concrete injury.

Per Curiam
For the Court:
GEORGE A. FISHER, Clerk
By: /s/ *Robert A. Bonner*
Chief Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1980
No. 80-1061
Civil Action No. 79-1703

DONALD W. RIEGLE, Jr.,
Member, U.S. Senate
Appellant

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*

BEFORE: Robinson, Chief Judge; Wright, McGowan, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards and Ginsburg, Circuit Judges and John Garrett Penn*, Judge United States District Court for the District of Columbia

ORDER

Appellant's suggestion for rehearing *en banc* has been circulated to the Court and no member of the Court, or of the panel, has requested the taking of a vote thereon. On consideration of the foregoing, it is

*Sitting by designation pursuant to Title 28 U.S.C. § 292(a).

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

By: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

United States Court of Appeals
for the District of Columbia Circuit

FILED July 17, 1981

GEORGE A. FISHER
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD W. RIEGLE, JR. 1207 Dirksen Building United States Senate Telephone: 224-4822 Plaintiff, v. FEDERAL OPEN MARKET COMMITTEE, JOHN J. BALLES, ERNEST T. BAUGHMAN, ROBERT P. BLACK, ROGER GUFFEY, MONROE KIMBREL, ROBERT P. MAYO, FRANK E. MORRIS, THOMAS M. TIMLEN, PAUL A. VOLCKER, and WILLIS J. WINN, Defendants.	:	Civil Action No. 79-1703 July 2, 1979

COMPLAINT FOR INJUNCTION

General Statement

This is an action to enjoin the defendant individuals from acting as officers of the United States as members of the Federal Open Market Committee, and to enjoin the defendant agency (the Committee) from permitting them so to act, on the ground that nominations of the defendant individuals to be officers of the United States have never been submitted to the Senate as required by Article II, Sec-

tion 2 of the Constitution, and their service as such deprives the plaintiff of his right to vote in determining the advice and consent of the Senate to their appointment.

Jurisdiction

1. This Court has jurisdiction of this action under § 1337 of title 28, United States Code, because it arises under an act regulating commerce, *viz.*, section 12A of the Federal Reserve Act (12 U.S.C. § 263).

2. This Court has jurisdiction of this action under § 1331(a) of title 28, United States Code, as an action brought against an agency of the United States arising under Article II, Section 2, of the Constitution, and section 12A of the Federal Reserve Act (12 U.S.C. § 263).

3. This Court has jurisdiction of this action under section 702 of title 5, United States Code, because the plaintiff is suffering legal wrong because of agency action.

The Plaintiff

4. The plaintiff has been a Member of the United States Senate since December 30, 1976, and is currently serving for a term expiring on January 3, 1983.

5. The Plaintiff is a member of the Senate Committee on Banking, Housing and Urban Affairs, which, pursuant to Rule XXV.1(d)(1)7 of the Standing Rules of the Senate, has jurisdiction to consider nominations of officers of the United States to serve in the Federal Reserve System.

The Agency Defendant

6. The defendant Federal Open Market Committee is an agency of the United States, created by section 12A of the Federal Reserve Act (12 U.S.C. § 263), to control pur-

chases and sales of securities on the open market by Federal Reserve banks. Its structure and function are more particularly described hereinafter in paragraphs 22 through 28.

The Individual Defendants

7. Each of the defendant individuals was appointed as an officer of a Federal Reserve bank by the board of directors of such bank, with the approval of the Board of Governors of the Federal Reserve System, for a term ending February 28, 1981, as more particularly set forth in the following table:

Name of Defendant	Position	Federal Reserve Bank
John J. Balles	President	San Francisco
Ernest T. Baughman	President	Dallas
Robert P. Black	President	Richmond
Roger Guffey	President	Kansas City
Monroe Kimbrel	President	Atlanta
Robert P. Mayo	President	Chicago
Frank E. Morris	President	Boston
Thomas M. Timlen	First V.-P.	New York
Paul A. Volcker	President	New York
Willis J. Winn	President	Cleveland

8. The board of directors of each Federal Reserve bank consists of nine members. The chairman, deputy chairman, and one other member of each such board of directors are appointed by the Board of Governors of the Federal Reserve System. The other six members of the board of directors of each such bank are elected by the commercial banks which hold the stock of such bank. (Federal Reserve Act, § 4, 12 U.S.C. §§ 302 et seq.)

9. Under the terms of the statute (Federal Reserve Act § 12A(a); 12 U.S.C. § 263(a)), 24 persons, the presidents

and first vice presidents of the twelve Federal Reserve banks, are eligible for election to the five positions as Reserve bank representatives and the five positions as alternate representatives on the Federal Open Market Committee.

10. No officer or group of officers of the United States has power to direct or control who shall be elected to the Committee from among the persons who by statute are eligible for such election.

11. Each of the defendants individuals is serving as a member or alternate member of the Federal Open Market Committee for a term ending February 29, 1980, having been elected thereto as follows:

(a) Paul A. Volcker was elected a member, and Thomas M. Timlen an alternate, by the board of directors of the Federal Reserve Bank of New York.

(b) Willis J. Winn was elected a member, and Robert P. Mayo an alternate, by the boards of directors of the Federal Reserve banks of Cleveland and Chicago.

(c) Robert P. Black was elected a member, and Frank E. Morris an alternate, by the boards of directors of the Federal Reserve banks of Boston, Philadelphia, and Richmond.

(d) Monroe Kimbrel was elected a member, and Ernest T. Baughman an alternate, by the boards of directors of the Federal Reserve banks of Atlanta, Dallas, and St. Louis.

(e) John J. Balles was elected a member, and Roger Guffey an alternate, by the boards of directors of the Federal Reserve banks of Minneapolis, Kansas City, and San Francisco.

12. The defendants have admitted that the defendant individuals are acting as officers of the United States, in that in accordance with the practice of the defendant agency, the defendant individuals, in their capacity as members or alternates of the Federal Open Market Committee separate and apart from their capacity as officers of Federal Reserve banks, have taken the oath of office as officers of the United States in accordance with Article VI of the Constitution.

13. The defendant Paul A. Volcker is serving as vice chairman of the Federal Open Market Committee, and under section 3 of the Rules of Organization of the Committee, performs the duties of the chairman in the absence of the chairman.

14. None of the defendant individuals has been appointed to the Federal Open Market Committee by the President, by and with the advice and consent of the Senate, nor do any of the defendant individuals serve on the Committee by virtue of any other office to which they have been so appointed.

15. The functions of the members of the Federal Open Market Committee, as more particularly set forth in ¶¶ 22 through 28 of this complaint, go beyond those which may be performed by an inferior officer of the United States.

16. None of the defendant individuals has been appointed to the Federal Open Market Committee by any of the constitutionally permissible means for the appointment of inferior officers of the United States, nor do any of the defendant individuals serve on the Committee by virtue of any other office to which they have been so appointed.

Open Market Operations

17. The Federal Reserve banks own a substantial portfolio of United States Government securities. For example, their aggregate holdings of such securities in the month of April, 1979, averaged approximately $105,618,000,000 (Federal Reserve Bulletin, May 1979, page A4).

18. The Federal Reserve Bank of New York, acting for itself and as an agent for the other Federal Reserve banks, makes substantial purchases and sales of United States Government securities in the open market.

19. The Federal Reserve Bank of New York, acting for itself and as an agent for the other Federal Reserve banks, makes substantial purchases and sales in the open market of foreign currencies or obligations payable in foreign currencies.

20. The open market operations of the Federal Reserve banks have a substantial effect in terms of regulating the value of foreign currencies relative to the currency of the United States.

21. The open market operations of the Federal Reserve banks constitute a major means by which monetary policy affects bank reserves, bank credit, money supply, interest rates, over-all credit conditions, investment, employment, and the value of the currency of the United States.

The Open Market Committee

22. The open market operations of the Federal Reserve banks are by statute subject to the direction and control of the defendant Federal Open Market Committee (Federal Reserve Act, § 12A(b); 12 U.S.C. § 263(b)), and in fact are conducted subject to and in accordance with such control and direction.

23. The formulation of Federal Reserve System open market policy by the defendant Federal Open Market Committee is and for the foreseeable future will continue to be a substantial and significant element in the determination of overall monetary policy, and as such has and will continue to have a profound effect on the value of the currency of the United States, foreign exchange rates, interest rates, investment, and employment.

24. The defendant Federal Open Market Committee by statute consists of twelve members, of whom seven serve as part of their duties as members of the Board of Governors of the Federal Reserve System, to which they have been appointed by the President by and with the advice and consent of the Senate. The other five are representatives of Federal Reserve banks who have not been so appointed, but who are elected by the boards of directors of such banks. (Federal Reserve Act, § 12A(a); 12 U.S.C. § 263(a)). The five persons currently serving as Federal Reserve bank representatives are, together with the five persons currently serving as alternates, the defendant individuals in this action. The manner in which they became eligible for election to the Committee is described in ¶ 7 of this complaint, and the manner in which they were elected is described in ¶ 11.

25. The seven presidents of Federal Reserve banks who, at any given time, are not currently members of the Federal Open Market Committee nevertheless customarily attend its meetings and express their views and in general act as *de facto* nonvoting members of the Committee.

26. When attending meetings of the Federal Open Market Committee as members (or alternates in the absence of members), the defendant individuals serve and vote on the same basis as those whose membership on the Committee is by virtue of the office they hold as members of the Board of Governors of the Federal Reserve System.

27. When voting as members or alternates on the Federal Open Market Committee, the defendant individuals are not subject to the direction, control, or supervision of any officer of the United States.

28. When voting as members or alternates on the Federal Open Market Committee, the defendant individuals exercise substantial power in the formulation of Federal Reserve System open market policy.

The Injury to the Plaintiff

29. By acting as officers of the United States when their nominations have never been submitted to the Senate, the defendant individuals deprive the plaintiff of his right to vote in determining the advice and consent of the Senate to their appointments.

30. By permitting the defendants individuals to act as officers of the United States when their nominations have never been submitted to the Senate, the defendant agency deprives the plaintiff of his right to vote in determining the advice and consent of the Senate to the appointments of the defendant individuals.

Prayer for Relief

WHEREFORE, the plaintiff prays:

I. That the Court permanently enjoin the defendant individuals from serving as members of the defendant agency, the Federal Open Market Committee; and that the Court permanently enjoin the defendant agency from permitting the defendant individuals to serve as members.

II. As an alternative to the relief sought in the foregoing paragraph I, that the Court permanently enjoin the defendant individuals from voting in, or serving as chairman or vice chairman of, the defendant agency; and that the

Court permanently enjoin the defendant agency from permitting the defendant individuals so to vote or serve.

III. That the Court render judgment for the plaintiff for all the costs of this action.

IV. That the Court grant such other and further relief as may be proper.

Respectfully submitted,

GRASTY CREWS, II
3107 H.O.B. Annex 2
House of Representatives
Washington, D.C. 20515
Telephone: (202) 225-3223
Attorney for the plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DONALD W. RIEGLE, JR., *Plaintiff,*	:	
v.	:	Civil Action No. 79-1703
FEDERAL OPEN MARKET COMMITTEE, ET AL., *Defendants.*	:	

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff respectfully moves the Court, pursuant to Federal Rule of Civil Procedure 56(a), to enter a Summary Judgment in plaintiff's favor for the relief requested in paragraphs II, III and IV of the Prayer for Relief in plaintiff's complaint, upon the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to judgment as a matter of law.

In support of this motion, the Court is respectfully referred to the Statement of Material Facts As to Which Plaintiff Contends There Is No Genuine Issue, the Statement of Points and Authorities in Support of Plaintiff's Motion for Summary Judgment, and plaintiff's Exhibits "A", "B", and "C", filed herewith.

Plaintiff respectfully requests an oral hearing on this motion.

Respectfully submitted,

GRASTY CREWS, II
Attorney for the plaintiff
3139 H.O.B. Annex 2
House of Representatives
Washington, D.C. 20515
Telephone: (202) 225-3223

Opposition

Office - Supreme Court, U.S.
FILED
NOV 3 1981
ALEXANDER L. STEVAS.
CLERK

No. 81-398

In the Supreme Court of the United States

OCTOBER TERM, 1981

DONALD W. RIEGLE, JR., MEMBER,
UNITED STATES SENATE, PETITIONER

v.

FEDERAL OPEN MARKET COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether petitioner's status as a United States Senator entitles him to challenge the constitutionality of an Act of Congress providing for the selection of members to the Federal Open Market Committee on the ground that it violates the Appointments Clause of the Constitution, Article II, Section 2, Clause 2.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Association of Data Processing Service Organizations, Inc. v. *Camp*, 397 U.S. 150	8
Coleman v. *Miller*, 307 U.S. 433	5
Duke Power Co. v. *Carolina Environmental Study Group*, 438 U.S. 59	6
Flast v. *Cohen*, 392 U.S. 83	8
Goldwater v. *Carter*, 444 U.S. 996	4, 7
Harrington v. *Bush*, 553 F.2d 190	8
Harrington v. *Schlesinger*, 528 F.2d 455	8
Holtzman v. *Schlesinger*, 484 F.2d 1307, cert. denied, 416 U.S. 936	8
Kennedy v. *Sampson*, 511 F.2d 430	5
Metcalf v. *National Petroleum Council*, 553 F.2d 176	8
Mitchell v. *Laird*, 488 F.2d 611	8
Powell v. *McCormack*, 395 U.S. 486	7
Reuss v. *Balles*, 584 F.2d 461, cert. denied, 439 U.S. 997	5, 8
United States v. *American Telephone & Telegraph Co.*, 551 F.2d 384	6, 7
Warth v. *Seldin*, 422 U.S. 490	6, 7, 8

Constitution and statutes:

United States Constitution, Article II, Section 2, Clause 2 (Appointments Clause)	3, 7, 8
12 U.S.C. 241	2
12 U.S.C. 248(f)	2

Constitution and statutes—Continued

Page

12 U.S.C. 263(a) 2, 6
12 U.S.C. (& Supp. III) 302 2
12 U.S.C. 304 2
12 U.S.C. 321 2
12 U.S.C. 341 2

Miscellaneous:

McGowan, *Congressmen in Court: The New Plaintiffs*, 15 Ga. L. Rev. 241 (1981) 4, 8
Note, *Congressional Access to the Federal Courts*, 90 Harv. L. Rev. 1632 (1977) 8

In the Supreme Court of the United States

OCTOBER TERM, 1981

No. 81-398

DONALD W. RIEGLE, JR., MEMBER,
UNITED STATES SENATE, PETITIONER

v.

FEDERAL OPEN MARKET COMMITTEE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 656 F.2d 873. The opinion of the district court (Pet. App. 20a-22a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 1981. A petition for rehearing was denied on July 14, 1981 (Pet. App. 26a-27a), and a suggestion for rehearing en banc was denied on

July 17, 1981 (Pet. App. 28a-29a). The petition for a writ of certiorari was filed on August 29, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Open Market Committee (FOMC) is part of the Federal Reserve System. Its function is to regulate and direct the purchase and sale of securities in the open market by Federal Reserve banks. These open market transactions are one of the means by which the Federal Reserve implements the nation's monetary policy. The FOMC has 12 members, seven of whom are the members of the Board of Governors of the Federal Reserve System. 12 U.S.C. 263(a). The members of the Board of Governors are appointed to their positions by the President with the advice and consent of the Senate. 12 U.S.C. 241. Under 12 U.S.C. 263(a), the remaining five members of the FOMC are selected by the boards of directors of the 12 regional Federal Reserve Banks from among the presidents and the first vice presidents of the Banks. The regional Federal Reserve Banks are private corporations whose stock is owned by member commercial banks. The member banks select six members of each Reserve Bank's board of directors, and the Board of Governors selects the other three. 12 U.S.C. (& Supp. III) 302 and 12 U.S.C. 304, 321. Each board of directors then selects the president and the first vice president of its Reserve Bank, but the selections are subject to the approval of the Board of Governors. 12 U.S.C. 341, 248(f).

2. Petitioner, a United States Senator, claims that the method 12 U.S.C. 263(a) prescribes for selecting the five Reserve Bank members of the FOMC is unconstitutional. He argues that under the Ap-

pointments Clause of the Constitution, Article II, Section 2, Clause 2,[1] all members of the FOMC must be appointed by the President with the advice and consent of the Senate. Petitioner sued in the United States District Court for the District of Columbia for an injunction prohibiting the five Reserve Bank members from voting (Pet. App. 7a).

The district court dismissed the complaint for lack of standing (Pet. App. 20a-22a). The court noted that petitioner's claimed injury was entirely derivative from an alleged injury "to the interest of the Senate as a whole" (*id.* at 21a). But this supposed injury, the court said, "does not stem from Executive action that frustrates an otherwise effective congressional enactment, nor does it impair [petitioner's] powers as a legislator in any manner that is not redressable by Congress" (*ibid.*). The court concluded that allowing petitioner to challenge a statute which he had failed to persuade his colleagues to amend "would improperly interfere with the legislative process" (*id.* at 22a).

The court of appeals affirmed (Pet. App. 1a-19a). The court concluded that "although there is room for argument as to whether [petitioner] clearly satisfies all requirements of the most stringent ver-

---

[1] The Appointments Clause provides:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the [S]upreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

sion of the Supreme Court's standing test, we think it reasonable to hold that he has standing" (*id.* at 12a). In particular, the court ruled that petitioner's "inability to exercise his [claimed] right under the Appointments Clause * * * is an injury sufficiently personal to constitute an injury-in-fact" (*id.* at 11a). But the court then noted "separation-of-powers concerns" raised by petitioner's claim and said it would "address[] [these concerns] independently of the standing issue" (*id.* at 13a)[2] because "[t]he most satisfactory means of translating our separation-of-powers concerns into principled decisionmaking is through a doctrine of circumscribed equitable discretion" (*id.* at 16a). The court explained (*id.* at 17a; emphasis in original): "When a congressional plaintiff brings a suit involving circumstances in which legislative redress is not available *or* a private plaintiff would likely not qualify for standing, [a] court would be counseled under our standard to hear the case."

Here, the court of appeals noted that petitioner's claim could be redressed by his colleagues (Pet. App. 17a). It also asserted that "one can easily conceive of a private plaintiff who could acquire standing to bring a similar claim" (*id.* at 17a). The court pointed out that petitioner's "attempt to prohibit voting by the five Reserve Bank members of the FOMC is yet another skirmish in the war over public versus private control of the Committee which has

---

[2] The court said it was doing so because this Court's decision in *Goldwater* v. *Carter*, 444 U.S. 996 (1979), "suggests [that] the Supreme Court does not believe that the standing doctrine is capable of reflecting the prudential concerns raised by congressional plaintiff suits" (Pet. App. 14a, citing McGowan, *Congressmen in Court: The New Plaintiffs*, 15 Ga. L. Rev. 241, 256 (1981)).

been waged in the legislative arena since 1933. It would be unwise to permit the federal courts to become a higher legislature where a congressman who has failed to persuade his colleagues can always renew the battle" (*id.* at 18a-19a). Thus the court concluded that to entertain petitioner's claim on the merits would " 'improperly interfere with the legislative process' " (*id.* at 19a).

ARGUMENT

1. The court of appeals correctly declined to entertain petitioner's claim. The only case involving a claim even remotely similar to petitioner's in which this Court upheld a legislator's standing to sue in his official capacity is *Coleman* v. *Miller*, 307 U.S. 433 (1939). *Coleman* involved a claim by state legislators that the institutional action of their body was illegally "overridden and virtually held for naught" (*id.* at 438).[3] Similarly, in *Kennedy* v. *Sampson*, 511 F.2d 430 (D.C. Cir. 1974), the only case in which the District of Columbia Circuit has held that a legislator had standing to sue as such (*Reuss* v. *Balles*, 584 F.2d 461, 466 (D.C. Cir.), cert. denied, 439 U.S. 997 (1978)), a Senator claimed that Congress's enactment of a bill had been nullified by an unlawful pocket veto. Petitioner can make no similar claim here; he does not even suggest that some act of the Senate or the Congress was nullified by respondents. Instead, it is petitioner who attempts to set "for

[3] *Coleman*, a five-to-four decision on this point (see 307 U.S. at 460 (Frankfurter, J., concurring)), may have been influenced by the circumstance that the suit was brought in a state court, which found that the legislators had standing. See *id.* at 465. In addition, all the state legislators who claimed their votes were nullified—an asserted majority of the body—joined in the claim. See *id.* at 438.

naught" legislation enacted by the body of which he is a member.

Nor can petitioner raise the claim that 12 U.S.C. 263(a) somehow invades the institutional prerogatives of the Senate under the Appointments Clause, for the Senate as an institution has never suggested that it wishes to assert such a claim. The Senate passed Section 263(a) when it became law. Petitioner does not claim that the Senate has recently attempted to repeal Section 263(a)—for example, by passing a bill to that effect—and been thwarted by the House of Representatives or the President. The Senate has not, to our knowledge, indicated that it considers Section 263(a) an unconstitutional nullity by purporting to disapprove the appointment of a Reserve Bank member of the FOMC. The Senate appears not even to have taken the minimal step of passing a resolution authorizing petitioner to bring this suit. See *United States* v. *American Telephone & Telegraph Co.*, 551 F.2d 384, 393 & n.16 (D.C. Cir. 1976). Every indication, therefore, is that the Senate has chosen not to assert that Section 263(a) invades its institutional prerogatives under the Appointments Clause.

Petitioner suggests no reason why he should be allowed to assert the Senate's rights when the Senate as an institution has not chosen to do so. In all but exceptional cases, of course, a litigant is barred from asserting the rights of third parties "not before the Court" when the third parties "may not wish to assert" those rights themselves. *Duke Power Co.* v. *Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978); see *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975). When dealing with sensitive conflicts between—or in this case within—coordinate branches of government, it is especially important that courts

not intervene prematurely or unnecessarily. See *Goldwater* v. *Carter*, *supra*, 444 U.S. at 997-998 (Powell, J., concurring); *United States* v. *American Telephone & Telegraph Co.*, *supra*.

Petitioner appears to recognize that he cannot assert the Senate's institutional prerogatives, for his claim is carefully phrased to allege an injury to himself; he asserts that the Reserve Bank FOMC members' "service as such deprives [petitioner] of his constitutional right to vote in determining the advice and consent of the Senate to their appointment" (Pet. 4). Neither the Appointments Clause nor any other provision of the Constitution creates such a right, however. Unlike the provisions of the Constitution dealing with the expulsion and exclusion of members of Congress (see *Powell* v. *McCormack*, 395 U.S. 486 (1969)), the Appointments Clause is not intended to protect the rights of individual Senators; it deals with the powers of the Senate as an institution. Indeed, given the Senate's apparent unwillingness to claim a right to review the appointments of Reserve Bank members of the FOMC, it appears that petitioner's asserted injury is not even "distinct and palpable" (*Warth* v. *Seldin*, *supra*, 422 U.S. at 501). He is free to express his opposition to an appointment in any number of ways; he may speak on the floor of the Senate or introduce resolutions of disapproval, for example. Petitioner does not explain why casting a futile vote in a Senate that does not share his views is a more effective means of expression, or if it is why the Appointments Clause guarantees him the right to that more effective means.

2. The court of appeals chose to reach the correct result in this case by invoking its "equitable discretion." We believe the issue can be fully analyzed in terms of standing; petitioner has not alleged a "dis-

tinct and palpable injury to himself" (*Warth* v. *Seldin*, *supra*, 442 U.S. at 501) that is even "arguably within the zone of interests to be protected" by the Appointments Clause (*Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970)). But as the court of appeals noted, various notions—standing, ripeness, political question, equitable discretion—can legitimately play some role in resolving the issues presented by claims like petitioner's. These overlapping notions are "of uncertain meaning and scope" (*Flast* v. *Cohen*, 392 U.S. 83, 95 (1968)), and while claims by members of Congress in their official capacity have generally been dismissed for lack of standing, courts and commentators have experimented somewhat with different formulations in analyzing these claims. See, *e.g.*, *Reuss* v. *Balles*, *supra*, 584 F.2d at 465-466 n.14 (standing, but citing political question and equitable discretion as possible alternative approaches); *Harrington* v. *Bush*, 553 F.2d 190, 207-209 & n.99 (D.C. Cir. 1977) (standing, but in a different form from *Mitchell* v. *Laird*, 488 F.2d 611 (D.C. Cir. 1973)); *Metcalf* v. *National Petroleum Council*, 553 F.2d 176 (D.C. Cir. 1977) (standing); *Harrington* v. *Schlesinger*, 528 F.2d 455, 459 (4th Cir. 1975) (standing, relying in part on plaintiffs' ability to seek legislative redress); *Holtzman* v. *Schlesinger*, 484 F.2d 1307, 1310 (2d Cir. 1973), cert. denied, 416 U.S. 936 (1974) (political question); McGowan, *Congressmen in Court: The New Plaintiffs*, 15 Ga. L. Rev. 241 (1981) (equitable discretion); Note, *Congressional Access to the Federal Courts*, 90 Harv. L. Rev. 1632, 1643-1652 (1977) (political question). The court of appeals, in this case, closely followed McGowan, *Congressmen in Court: The New Plaintiffs*, *supra*, not, apparently, because it saw a great difference among the principles underlying the dif-

ferent rubrics, but because it thought equitable discretion was "[t]he most satisfactory means of translating [the] separation-of-powers concerns" (Pet. App. 16a) that are expressed in all the various doctrines.

The mere fact that the court of appeals appears to have chosen a debatable pigeonhole here—as we believe it has—does not, however, justify this Court's review. Despite their shifting formulations, the District of Columbia Circuit and the other courts of appeals have achieved an underlying consistency of results, holding that a member of Congress has standing only where a specific legislative enactment was nullified by executive action. See page 5, *supra*. There is no reason at this time to believe that that underlying consistency is threatened. In our view, the court of appeals' abstract expressions alone are not sufficient reason for this Court to intervene. Moreover, it is not clear how the District of Columbia Circuit intends to apply its new test in the numerous, diverse situations that are certain to arise. We suggest that it would be useful for this Court to have the benefit of the court of appeals' experience under its new formulation before determining whether the rule announced by the court below deserves further review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

J. PAUL MCGRATH
Assistant Attorney General

ANTHONY J. STEINMEYER
Attorney

NOVEMBER 1981

☆ U. S. GOVERNMENT PRINTING OFFICE, 1981 357321 658

Petitioner's Reply Brief

Office - Supreme Court, U.S.
FILED
NOV 6 1981
ALEXANDER L. STEVAS,
CLERK

No. 81-398

IN THE
Supreme Court of the United States
OCTOBER TERM, 1981

DONALD W. RIEGLE, Jr., Member,
United States Senate,
Petitioner,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

GRASTY CREWS, II
1511 K Street, N.W.
Washington, D.C. 20005
(202) 638-4500
Attorney for Petitioner

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DONALD W. RIEGLE, Jr., Member,
United States Senate,

Petitioner,

v.

FEDERAL OPEN MARKET COMMITTEE, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY TO BRIEF IN OPPOSITION

The brief for the respondents in opposition boils down to a confession that the court of appeals committed not one but two fundamental doctrinal errors. Respondents concede that the use of the doctrine of equitable discretion is simply indefensible in the context of this case; the kindest thing they can find to say about it is to agree "that the court of appeals appears

to have chosen a debatable pigeonhole here" (Resp. Br. 9). To strengthen their position that this error should be ignored, they characterize the subject of their admission as a "mere fact" (Ibid.). To defend the result, they argue that the court of appeals also erred in holding that the plaintiff had standing to bring the action. In their minibrief on the merits, scant attention is given to the considerations set forth in this Court's Rule 17.

Nowhere do respondents question the importance of the power which the petitioner seeks to protect: they well know that under the American scheme of constitutional government, this nexus between the electorate and the selection of appointive officers is fundamental to the legitimacy of the power such officers wield. Nowhere do respondents question the gravity of the power which they themselves possess: they know it is awesome. Against this background, in a curious inversion of priorities, they acquiesce in legislator standing to vindicate a legislative enactment (Resp. Br. 5), yet bitterly oppose such standing to vindicate the Constitution itself.

Perhaps the most constructive way to view the respondents' brief is as the substantial equivalent of a cross-petition. Despite their failure to deal with the inconsistencies between the holdings of the cases they cite and the position they urge, they do make a strong argument, however inadvertently, that this Court should grant a writ of certiorari on the question they frame, which would embrace the issue of standing as well as the issue of equitable discretion (Resp. Br. 1). Although the time for filing a cross-petition expired under Rule 19.5 on September 28, both the respondents' brief and the opinion of the court of appeals strongly support the need for clarification by this Court in this important and sensitive area of constitutional law. For that reason, the petitioner does not oppose the granting of a writ of certiorari on the question framed by the respondents.

Respectfully submitted.

GRASTY CREWS, II
1511 K Street, N.W.
Washington, D.C. 20005
(202) 638-4500
Attorney for Petitioner